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No. 84-1545

In the Supreme Court of the United States

OCTOBER TERM, 1985

MILLER-WOHL COMPANY, INC., APPELLANT

v.

COMMISSIONER OF LABOR AND INDUSTRY OF MONTANA and TAMARA L. BULEY

ON APPEAL FROM THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a state law that requires an employer to provide leave to employees who are pregnant is inconsistent with 42 U.S.C. 2000e(k), as amended by the Pregnancy Discrimination Act of 1978.

2. Whether such a state law violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Appellant operates a chain of retail stores selling ladies' apparel, including several stores in Montana. The Montana stores are subject to the Montana Maternity Leave Act (MMLA), which prohibits private employers from terminating an employee because of pregnancy and requires them to "grant the employee a reasonable leave of absence for such pregnancy" (Mont. Code Ann. § 39-7-203 (1983)).

Appellant's Montana stores operate under a published employment policy that provides, inter alia,

that no employee is entitled to sick leave or to a leave of absence until that employee has worked for appellant for at least one year. This policy applies to every employee, male or female, and allows no exception for any disability.

In August 1979, appellee Tamara Buley began employment as a part-time sales clerk in appellant's Great Falls, Montana, store. Almost immediately, Buley began to miss work because of illness (J.S. App. 4b-5b). Within two weeks, Buley discovered she was pregnant and told her supervisor. "Morning sickness" resulting from her pregnancy interfered with her job performance, and caused repeated absences. She was accordingly dismissed within four weeks of beginning employment. Buley protested her termination in a complaint filed with the Montana Commissioner of Labor and Industry (the Commissioner), in which she claimed that appellant had violated the MMLA by discharging her because of pregnancy. J.S. App. 5b.[1]

2. Appellant brought suit against the Commissioner and Buley in the United States District Court for the District of Montana, seeking to enjoin enforcement of the MMLA by the Commissioner. The district court initially issued a temporary restraining order prohibiting entertainment of Buley's complaint but, on expiration of the order, allowed the Commissioner to proceed. J.S. App. 5b.

On October 3, 1980, the Commissioner awarded Buley backpay, ruling that appellant had violated the

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[1] It is not clear from the record whether Buley was discharged because of her pregnancy per se or because she was performing her work unsatisfactorily as a result of her pregnancy. It also is not clear whether the Commissioner or any court has made a finding on that issue.

MMLA by dismissing her. The Commissioner also ruled that the MMLA did not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution or Title VII of the Civil Rights Act of 1964 (the Act), 42 U.S.C. 2000e *et seq.* (J.S. App. 1d-26d).

The federal district court subsequently concurred in the Commissioner's conclusions (J.S. App. 5b; 515 F. Supp. 1264). On appeal, however, the Ninth Circuit declined to reach the merits and vacated the district court's judgment for want of jurisdiction. 685 F.2d 1088 (1982). The Court reasoned that appellant's federal claims were simply defenses to Buley's state claim, and thus did not provide an independent basis for federal jurisdiction (*id.* at 1090).

3. Appellant petitioned in state court for review of the Commissioner's decision. On February 8, 1984, the state district court reversed the Commissioner's order, holding that the MMLA violates the Supremacy Clause (Art. VI, Cl. 2) because it is inconsistent with Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, 92 Stat. 2076 *et seq.* (J.S. App. 1c-4c). The Commissioner and Buley appealed that decision to the Montana Supreme Court.

The Montana Supreme Court reversed (J.S. App. 1b-27b). The court ruled that the MMLA does not conflict with Title VII, as amended by the PDA, because the "policy and purpose of the MMLA is to protect equal job opportunities for women as compared to others by removing a female disability job risk not faced by men and non-pregnant females" (J.S. App. 4b). Assuming that appellant's no-leave policy has a disparate impact on women and violates Title VII for this reason (J.S. App. 20b), the court

agreed with the federal district court (515 F. Supp. at 1266) that the MMLA's requirement for special treatment of the pregnant "places men and women on more equal terms" and therefore satisfies Title VII (J.S. App. 24b). Thus, the Montana Supreme Court ruled that the MMLA is consistent with the PDA precisely because it provides special treatment for disabilities associated with pregnancy.

DISCUSSION

This case raises a difficult conflict between two sets of broad and significant concerns: on the one hand, there is the nondiscrimination principle, in particular as it applies in the employment area to open to all persons the full range of economic opportunities; on the other hand, there is the recognition of the traditional role of the states in promoting family life, particularly in protecting maternal and infant health. The United States responds to the Court's invitation against the background of these concerns, which are shared by Congress, whose intent ultimately it is our duty to discern.

We conclude that Congress in the PDA adopted a form of words that clearly committed it to the nondiscrimination principle, mandating that "women affected by pregnancy [or] childbirth * * * shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work * * *" (42 U.S.C. 2000e(k)). But Montana has regulated in such a way that if employers complied without more, they would indeed be discriminating on grounds of pregnancy, by favoring, not disadvantaging, the subject class. If federal law were silent, state legislation so favoring this class would, in our view, plainly pass

constitutional muster. Because such favoring legislation is not permitted by Title VII, however, the decision of the Supreme Court of Montana cannot stand.

1. In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), this Court considered the legality of an employer's disability benefit plan that excluded disabilities arising from pregnancy. Relying on *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), which rejected an attack on a similar program on constitutional grounds, the Court held that the G.E. plan did not violate Title VII. "Since it is a finding of sex-based discrimination that must trigger * * * the finding of an unlawful employment practice under § 703(a)(1)," the Court held that "*Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all" (429 U.S. at 136).

In response to the *Gilbert* ruling, Congress enacted the PDA, which amended Section 701 of Title VII. The first clause of the new subsection made clear that Title VII's prohibition of discrimination " 'because of sex' " or " 'on the basis of sex' " was intended to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions" (42 U.S.C. 2000e(k)). The second clause declared that (emphasis added):

> [W]omen affected by pregnancy, childbirth, or related medical conditions *shall be treated the same for all employment-related purposes*, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work * * *.

The language of Title VII, as amended by the PDA, is thus clear and unqualified in its sweep: it is as ringing an affirmation of the nondiscrimination principle as could be imagined. Here, as in *Maine* v. *Thiboutot*, 448 U.S. 1, 8 (1980) (footnote omitted):

> Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended. [Appellees'] arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship [between state and federal laws], it might have acted differently. That argument, however, can best be addressed to Congress * * *.

See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980) (language used by Congress normally "must be construed to mean exactly what it says"); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 492 (1947); *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945).

Although "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute" (*Harrison* v. *PPG Industries, Inc.*, 446 U.S. at 592), here the legislative history of the PDA is fully consistent with the broad language Congress employed. The House Report (H.R. Rep. 95-948, 95th Cong., 2d Sess. 4 (1978)), for example, emphasized that the legislation would require equal rather than preferential treatment of pregnant employees:

> This legislation would clearly establish that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 includes a prohibition against employment-related discrimination on the basis of pregnancy, childbirth, or related medical conditions. * * *
>
> It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. [The PDA] in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

See also *id.* at 3, 5, 6. The Senate Report reflects the same intent (S. Rep. 95-331, 95th Cong., 1st Sess. 4 (1977)):

> [T]he bill, because it would operate as part of title VII, prohibits only discriminatory treatment. Therefore, the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

The great bulk of the floor statements speak in similarly unqualified terms.[2] Although the context

[2] For example, when the PDA was being debated on the Senate floor, Senator Brooke stated: "I would emphasize

of these pronouncements and of the legislative effort as a whole was to eliminate pregnancy as an occasion for disadvantaging discrimination, and the question of prohibiting advantaging discrimination was not directly considered, Congress nonetheless announced a general principle outlawing *any* difference in treatment, for *any* employment-related purpose, on grounds of pregnancy. Absent some clear indication in the legislative history to the contrary (and we have found none),[3] it is that principle which should be applied according to its terms. See *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 681 (1983) (the PDA was "intended to protect *all* individuals from sex discrimination in employment—including pregnant women workers") (emphasis in original).

2. a. In determining whether a federal law preempts a state statute, and thus renders it invalid under the Supremacy Clause (Art. VI, Cl. 2), a court's task is to ascertain Congress's intent in en-

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most strongly that S. 995 in no way provides special disability benefits for working women. They have not demanded, nor asked, for such benefits. They have asked only to be treated with fairness, to be accorded the same employment rights as men" (123 Cong. Rec. 29664 (1977)). See also 123 Cong. Rec. 7541 (1977) (remarks of Senator Mathias); 123 Cong. Rec. 29659 (1977) (remarks of Senator Williams); 123 Cong. Rec. 29661 (1977) (remarks of Senator Biden); 123 Cong. Rec. 29663 (1977) (remarks of Senator Cranston).

[3] The favorable references to "[state] laws which specifically refer to pregnancy" (S. Rep. 95-331, 95th Cong., 1st Sess. 3 (1977)) and particularly to the Montana statute as an example of such a law (H.R. Rep. 95-948, 95th Cong., 2d Sess. 11 (1978)) do not demonstrate that Congress was aware of the terms of these statutes, still less that Congress had determined that they were consistent with the PDA.

acting the federal statute at issue. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). "Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose,' " *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 152-153 (1982), quoting *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the absence of express congressional intent to occupy a field, state legislation cannot stand when it is impossible to comply with both state and federal law, see *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when state law frustrates accomplishment of the full purposes of Congress. See *Capital Cities Cable, Inc.* v. *Crisp*, No. 82-1795 (June 18, 1984), slip op. 5-6; *Hines* v. *Davidowitz*, 312 U.S. 52, 67-68 (1941).

The Civil Rights Act of 1964 includes specific provisions regarding its preemptive effect on state legislation. Section 1104 of the Act, 42 U.S.C. 2000h-4 provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provisions thereof.

In addition, Section 708 of the Act, 42 U.S.C. 2000e-7 provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability,

> duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

In light of the purposes of the PDA, discussed above, and this clear statement of preemptive intent, we conclude that the Montana statute must be invalidated. The MMLA announces the policy of the State of Montana that an employer must grant benefits to pregnant women that it need not grant to other employees. An employer that abides by that state policy would run afoul of the requirement imposed by Title VII, as amended by the PDA, that pregnant women "be treated the same" as other persons not so affected "for all employment-related purposes". (42 U.S.C. 2000e(k)). Thus, Montana law is "inconsistent with" one of the purposes of Title VII and "require[s] or permit[s] the doing of an[] act which would be an unlawful employment practice under" Title VII.

We do not believe that this conflict between state and federal law may be eliminated by construing the MMLA to require employers within the State to extend the benefits mandated for pregnant women to all members of the workforce. To be sure, such a construction of state law would allow an employer to comply with both the MMLA and Title VII. But it would be most inappropriate for a federal court to save a state statute by mandating, in the name of Title VII, a general program of unpaid disability leave for *all* employees, when there is no indication that the State intended to impose such a burden on its employers. See *Heckler* v. *Mathews*, No. 82-1050

(Mar. 5, 1984), slip op. 9 n.5. If Montana's family protective purposes are to be served by a radically more extensive scheme, the courts or legislature of the State should make that judgment. Indeed, the Montana Supreme Court had the opportunity to interpret its statute in this way and declined to do so, referring the question to the state legislature for consideration (J.S. App. 26b).

Given this authoritative state court construction of the MMLA, this Court should invalidate the Montana statute under the Supremacy Clause because it requires in terms what Congress has forbidden. On remand, the Montana court may then consider whether, in view of this Court's construction of Title VII, the MMLA should be interpreted so as to generalize its benefits and thus to bring the state statute into conformance with federal law. See *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 152-153 (1980) ("[b]ecause state legislation is at issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying the constitutional violation"). But that is a decision that should not be anticipated here.[4]

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[4] To solve the discrepancy between state law and Title VII by requiring employers in Montana to extend MMLA benefits to all employees as a matter of federal law—rather than pursuant to a possible later reconsideration by the State of its own policies—might well be inconsistent with the clearly expressed intent of Congress in enacting the PDA. Congress repeatedly emphasized that it intended that employers be free to provide any level of benefits they wished—or none at all—so long as they did not use pregnancy as a criterion for allocating those benefits. See, *e.g.*, S. Rep. 95-331, *supra*, at

b. In addition to its argument based on the Supremacy Clause, appellant claims that, by requiring special benefits for pregnant women, the MMLA violates the Equal Protection Clause of the Fourteenth Amendment (J.S. 17-19). The Court need not reach the constitutional question in this case, because the MMLA is inconsistent with the PDA. In any event, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), forecloses appellant's constitutional claim. *Geduldig* held that state classifications based on pregnancy are not gender classifications under the Equal Protection Clause. That ruling is dispositive here. It cannot be contended that the State lacks a rational basis for singling out pregnant women for special protections. See *Harris* v. *McRae*, 448 U.S. 297, 325 (1980).

3. For these reasons, we believe that appellants have presented a substantial federal question that warrants the Court's review. We note, however, that this case contains certain complexities and ambiguities that may make it a less convenient vehicle for exploring this issue than *California Federal Savings & Loan Ass'n* v. *Guerra (Cal Fed)*, petition for cert. pending, No. 85-494.

Cal Fed was decided on cross motions for summary judgment on the basis of stipulated facts. In that case, it was stipulated that the employer grants unpaid disability leave of up to six months to all employees who have completed a three-month probationary period, but reserves the right to discharge the

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4; H.R. Rep. 95-948, *supra*, at 5; 123 Cong. Rec. 29664 (1977) (remarks of Senator Biden); *id.* at 7541 (remarks of Senator Brooke). To reconcile the PDA with the MMLA, therefore, it would be necessary to interpret the PDA as requiring in this context exactly what Congress deliberately eschewed, *i.e.*, extension of benefits by a nondiscriminating employer.

employee if no suitable position is available when the employee recovers from the disability. The State of California interprets this policy as inconsistent with Cal. Gov't Code § 12945(b)(2) (West 1980), which requires reinstatement of employees after maternity leave unless the employer shows a business necessity for its refusal to do so. 85-494 Pet. App. E6-E12.

In *Cal Fed*, the court of appeals expressly declined to rely on any disparate impact that the employer's policy might have on pregnant women (85-494 Pet. App. A6-A7); there is, accordingly, no suggestion in the *Cal Fed* opinion that the employer's policy violated Title VII as well as the state statute, as there is in this case (see J.S. App. 3b, 18b-20b). Moreover, in the instant case, there is the possibility that appellant engaged in disparate treatment of Buley. It is not entirely clear from the opinion or the record whether she was discharged because of her pregnancy per se or because she was performing her work unsatisfactorily (compare J.S. App. 15b, 18b with 16b-17b). If she were dismissed simply because she was pregnant, appellant would have violated both state and federal law, and Buley would be entitled to relief without regard to the validity of the MMLA. Conduct that violates both federal and state law provides a poor basis for a Supremacy Clause challenge.[5]

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[5] An additional complication in this case is the fact that it arose within one year of enactment of the PDA and therefore might be subject to the PDA's prohibition against reducing benefits to any employee. See ACLU Am. Br. 33-45. We disagree with the ACLU's submission, because Section 3 of the PDA (92 Stat. 2076-2077) does not apply where, as here, an employer was not providing any benefits on the effective date of the Act. See 123 Cong. Rec. 10581 (1977) (remarks of Rep. Hawkins). See also S. Rep. 95-331, *supra*, at 8; H.R. Rep. 95-948, *supra*, at 154; 123 Cong. Rec. 75411 (1977) (re-

To be sure, this case has certain attractive features not present in *Cal Fed*. Principal among these is the fact that the case comes from the Montana Supreme Court, which has provided an authoritative interpretation of the state statute. In these circumstances, the Court may wish to note probable jurisdiction in this case, grant certiorari in *Cal Fed*, and either hear the cases in tandem or consolidate them for purposes of oral argument.

CONCLUSION

Probable jurisdiction should be noted, and the case should be considered with *California Federal Savings & Loan Ass'n* v. *Guerra*, No. 85-494.

Respectfully submitted.

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marks of Senator Brooke). Nevertheless, *Cal Fed* does not contain this complication.

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